

“Is it a dictatorship and a police state yet?” Scheppele and Halmai on current Hungarian constitutional politics

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Christian Boulanger Mi 11 Jul 2012

Ever since the sweeping election victory of Victor Orbán's FIDESZ party in 2010, there has been an international controversy about the developments in Hungary's political landscape. In most cases, the reception given to the political initiatives of the Orbán government and its parliamentary super-majority (the current coalition controls over two thirds of the legislature) have been extremely negative. Most attention focused on a [new media law](#) and on the new constitution (see [here](#), [here](#), and [here](#); for a more positive commentary, see [here](#)). The ruling majority had drafted and passed this constitution in a controversial process that was, for many observers, far from being transparent and inclusive. More than that – the new Constitution changed the balance of power structure by [weakening](#) the Constitutional Court while at the same making sure that institutions with government-appointed heads (like the Media Authority) or the so-called “cardinal laws” (see a [critical](#) and a [positive](#) assessment) would be safe from potential future opposition-led (simple) majorities. Criticism came from all quarters: the media, governments, [scholars](#), and international organizations such as the [Council of Europe](#). The European Union [initiated](#) infringement procedures which led to the [modification](#) of the disputed laws.

Common to most reactions was a concern over the direction Hungary's democracy and legal system is taking. However, as some observers (for example the German-language blog [Hungarian Voice](#)) have pointed out, some of the reactions, in particular parts of the media echo, contained exaggerated or even factually incorrect statements. This has made it easier for the government to reject even legitimate criticism of its policies as biased or as a campaign of the previous Socialist government and [its alleged international left-wing supporters](#). But what is really wrong with the policies of the current Hungarian government? The following text is a shortened version of a conversation between Gabor Halmai (Princeton University/ELTE Budapest and editor of the major legal theory journal in Hungary, Fundamentum) and Kim Lane Scheppele (Princeton University) on the current constitutional politics of Hungary ([formerly](#): the “Republic of Hungary”). It appeared in Hungarian in Fundamentum and is published here to give readers of this blog a glimpse of the issues at stake and the intensity of the international repercussions (that nobody in Orbán's circle seems to have anticipated). Kim Lane Scheppele authored a [series of articles](#) in Paul Krugman's [blog](#) at the New York times, in which she did not mince words (see also this [talk](#) at the CEU in Budapest). These blog posts found a large audience, but has also stirred up some controversy. Halmai and Scheppele have edited a [report on Hungary's new constitutional structure](#) and are currently preparing a book on Hungary that will be published next year. The complete text of the conversation, containing more details on the Hungarian condition, can be found at the [Hungarian Spectrum blog](#).

How to describe the new Hungarian political order

Gábor Halmai: In the book we are writing, we try to understand how Hungary, one of the forerunners of the post-communist constitutional democracies has fallen back – to say the least – to an illiberal democracy, if not to an authoritarian regime, after twenty years of constitutional development. In your posts on Paul Krugman's New York Times blog you even went on to say that an unconstitutional Basic Law introduced a one-party police state. Before going into the facts and reasons for democratic backsliding, how would you characterize the current Hungarian political and constitutional system after the new Basic Law and most of the so-called cardinal laws have come into effect?

Kim Lane Scheppele: The new constitutional order is not a rule-of-law state in its formal legal features, which is a

serious step backwards for Hungary. A constitutional rule-of-law state requires three elements: a guarantee that power can rotate among different political parties through free and fair elections, a guarantee that the elected government is constrained through a system of independent checks on power and a system for ensuring that individuals have meaningful rights that they can assert against the state so that they remain authors of their own lives. All three elements of constitutional government have been compromised with the new Hungarian constitution and the accompanying system of cardinal laws. That is why I have resorted to extreme descriptions.

The new constitutional order will make it much harder for any political party other than the governing one to come to power. The election districts have been gerrymandered.

But it happens in other democracies, like the US, as well.

Yes, many countries have gerrymandered election districts. In fact, the practice was invented by an American, Elbridge Gerry, who famously created a district shaped like a salamander in 1812. But I know of no other country where it takes a 2/3rds votes of the parliament to change the election districts and where the law establishes almost no criteria for determining whether the districts are fairly drawn.

But voters change their minds about what they want, and it is impossible to create districts that prevent a huge change of opinion from bringing in a new government.

Yes, that's true. But the worry about whether the new constitutional order guarantees rotation of power extends beyond the point about election districts. To have a new government, one needs to have viable political parties. But right now, no opposition party can plan for the next election. A required procedural law that regulates how elections will be conducted has yet to be enacted. And the governing party has not yet even floated a draft for review. As a result, any opposition party that wants to contest the next election does not know what the rules are for doing so.

To make matters worse, the governing party recently proposed to eliminate all state subsidies for parties during the next election cycle – a policy not crazy in its own right, but which is announced too close to an election to be fair to opposition parties. It will be impossible to have a free and fair election unless those who want to contest power know what the rules of the game are with sufficient time to plan an electoral strategy.

Out of balance?

You mentioned checks on power, but Hungary has a parliamentary system in which the executive and legislative branches are not separated as they are in the American system. The American system cannot be a model for Hungary.

Yes, I agree. But even a parliamentary system needs institutions that keep an elected majority within constitutional constraint. The new Hungarian constitutional order has no serious checks on the government's power. The Constitutional Court's ability to review laws for constitutionality has been sharply curtailed and the court has been packed with judges sympathetic to this government. Since the new system has gone into effect – nearly half a year now – the Constitutional Court has disappeared from the political landscape. The independence of the ordinary judiciary has been comprised through the introduction of a highly political system for selecting, disciplining and assigning the workload of judges, as a Venice Commission report recently confirmed. The accountability

institutions have all been weakened, either because their staffs and jurisdictions have been cut (e.g. the former ombudsmen's office) or because the offices have been filled with people who have long histories of association with the governing party (e.g. the state audit office, public prosecutor, media board, the national judicial office and increasingly even the monetary council). The media are under constant threat from the all-powerful Media Board and they are required to carry news from the government-controlled news service. As a result, the current governing party can operate almost without constraint, particularly given that it has a supermajority in the parliament that can override any adverse decisions that slip through the cracks.

You have hinted in your posts on the Krugman blog that Hungary is essentially now a one-party state. But Hungary surely does not have a one-party state of the sort that existed between 1949-1989! Admittedly, the party structure of the new Hungarian democracy was incomplete and very weak from the very beginning. There was no real social democratic party or an effective social liberal party. That opened the space for a populist party like Fidesz to have strong support. Without a robust party system, revitalizing Hungarian democracy is much harder.

Constitutional theorists like us often underestimate how important political parties are. Modern democracies in mass societies cannot operate without them. If the party structure is weak and unrepresentative, then this is a problem for the whole democratic order. Hungary started the transition in the first election of 1990 with what appeared to be a quite robust party system, which was maintained through much of the 1990s. But then we saw that most of the parties had no system in place for rotating leadership, bringing in younger generations of party members and deepening their connections with their supporters. By the end of the decade, the party system was falling apart and we saw the final results in the 2010 election. In fact, the latest opinion polls show that a clear *majority* of the Hungarian people supports no party at all. This is a sign that the party system has collapsed, which is precisely why the governing party has no well-organized opposition at the moment and why democracy itself is at risk.

You mentioned that a constitutional rule of law state needs to guarantee the protection of rights. Would you say that there is a lack of separation of powers currently in Hungary, which makes the protection of rights impossible?

In a system where rotation of political power cannot be assured and where the government of the day has few checks on its power, it is impossible to protect rights if they come under attack. Who is left to defend rights of vulnerable populations if the current government decides that rights are inconvenient to maintain? With power-checking institutions weakened, rights depend entirely upon the good will of the government. Rights need defenders, which means relying on independent institutions strong enough to stand up to a potentially abusive government. If the government controls all institutions, then where do those whose rights are infringed by this government go? That is what constitutions are supposed to ensure – independent defenders of rights.

Defending rights in a majoritarian democracy

Many supporters of the government argue that there are states governed by the rule of law that do not have strong constitutional review, like the UK or France. Besides, in Hungary, the Constitutional Court still has important competences, with a real, German-type constitutional complaint jurisdiction, which many constitutional scholars – including myself – requested from the very beginning of the transition. In addition, the only remaining ombudsperson, who still has the power to initiate abstract review at the Constitutional Court, recently filed very important petitions, including challenges to the

Yes, the Constitutional Court has been weakened, but officially it still exists. And petitions are piling up at the Court waiting to be answered, both through constitutional complaints from those whose rights have been directly infringed and from abstract challenges forwarded by the ombudsman's office. If the Constitutional Court were an independent institution as strong as it was in the 1990s, these petitions would give the Court a chance to be a major check on the power of the government.

But the Constitutional Court has a clear majority of judges who have had long affiliation with the governing party. One might have hoped – and one still can hope – that these judges will show themselves to be independent of those who put them onto the Court. But early signs are not encouraging. Since the new judges have gone onto the bench, the Court has issued only three decisions that challenged the government at all. One unconstitutional law – giving the prosecutor the power to pick the court that would hear each case – was easily “fixed” by amending the constitution to override the Court. Another unconstitutional law – on the status of the churches– was reenacted virtually unchanged as the Court had criticized only the procedure used to enact the law without dealing with the challenges to the law's substance. The fate of the third unconstitutional ruling that nullified part of the media law is still pending, but the Constitutional Court dealt only with the rather small-bore restrictions on the print media rather than with the much more important challenges – restrictions on broadcast communications or the unrepresentative composition and extreme powers of the Media Council itself.

| *Exactly this part of the media law was now challenged by the ombudsman.*

Yes, and the Constitutional Court may yet rise to the challenge and rule on the constitutionality of the new system of media regulation. But I am not optimistic in light of what we have seen so far. Even when the Constitutional Court has made important decisions, however, they have made almost no difference. And given that the government clearly knew about the three decisions I mentioned before they were announced, this has given rise to public speculation that the Court only does what the government permits it to do. I do not know whether that is really true or not, but the existence of the speculation is also not good for constitutional review.

But the most striking thing is that the Court has been silent on the key issues of the day, even though we know petitions sit before the Court that would give it an opportunity to intervene.

It's true that constitutional democracies survive and even thrive without constitutional review by a high court. But in those systems, like the UK or the Nordic countries, other institutions – like powerful ombudsmen, public inquiries, parliamentary house rules that give important roles to minority parties, and substantial accountability offices – perform those functions. Almost everywhere, however, courts are gaining increased power. The new UK Supreme Court now has the power to declare statutes incompatible with human rights; Nordic courts can review laws for their compliance with EU law, including European human rights law. And France just greatly enlarged the capacity of the Constitutional Council to review laws for constitutionality.

So yes, not all constitutional democracies have the same robust constitutional review Hungary once had. But almost all countries that built their democracies without judicial review are moving to have more judicial review from now on.

Hungary is the only democratic country that has taken away the already-granted powers of a constitutional court. And that is surely a bad sign.

A police state on the horizon?

| *Do you really think that the police state that existed before 1989 was again reintroduced?*

Not in the same form. But there are worrying tendencies that secret surveillance is both growing and increasingly unaccountable. In addition, evidence is mounting that the government is again creating data bases with detailed profiles of citizens who have not violated any criminal law. Hungary currently has not only a new and very powerful anti-terrorism office (TEK) with broad powers, virtually unlimited capacities for surveillance, and no accountability to anyone outside the Prime Minister's immediate circle, but it also has several other powerful intelligence agencies that also have extraordinary capacities to conduct intrusive surveillance and that have alarmingly few serious external controls. In a government with few checks on its powers, who keeps the intelligence services from becoming merely another arm of state power that keeps the current rulers in office and that uses spying to suppress dissent?

| *But the general regulation of the intelligence services was already in place, when this government came into power.*

Yes, the intelligence services were already a problem before the Fidesz election of 2010. The police, Constitutional Protection office (AH), the Bureau of Information (IH) and the Special National Security Service (NBSZ) were able to engage in widespread surveillance upon order of the government of the day and, while they were formally accountable to the parliament, the parliament never did much with this power. There are also various military intelligence branches, some of which are permitted to operate within the country and not just outside. All of these agencies had overlapping competencies to spy on citizens even before Fidesz came to power, so the secret police problem is not new.

The new government, however, has consolidated control of the security services under the interior minister and prime minister, enlarged the capacity of the security services to engage in intrusive surveillance operations without a judicial warrant and empowered the security services to gain more private data from third-party service providers with fewer constraints (giving the government access to the content of emails, medical files and more). Though there were already too many security services with too much power before, the Fidesz government has invented two new security agencies: the TEK about which I have already written extensively and also the National Protective Service (NVSZ) which supervises the other domestic security services. The NVSZ, as a new institution, supervises the personnel of the other security services, almost like creating a new agency to spy on the spies. As a result, the new agencies created under the Fidesz government have given this government the power to intimidate the personnel they inherited from previous governments and to shape the security services the way that they want.

| *Surely, though, Hungary is not a party state or a police state!*

I know many Hungarians don't share my view that the situation has gotten this bad in daily life. Walking down the streets of Budapest, as I did a few months ago, one can see that Hungary doesn't feel like either a party state or a police state. But I draw conclusions based on an analysis of the laws. Given the new legal framework, a government operating under it could choose to do virtually anything it wants. That is why I have used such alarming descriptions for the current state of affairs.

Perhaps this will be a government of angels, acting in a democratic, self-constrained and rights-respecting manner even though the law does not require it. But as one of the main authors of the US Constitution, James Madison, wrote, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men

over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Even though America has an exceptional constitutional order that cannot be copied, James Madison was right about why all democratic governments need constitutions.

| *But, as Andrew Arato argues in a recent article of his it is still too early to call Hungary a dictatorship.*

A government without controls is a potentially dangerous government. Is it a dictatorship and a police state yet? Perhaps not. But it has the legal framework in place that would allow an easy slide into both. That is why I have decided to speak out in such forceful terms.

There is an old story about a frog who sits in a pot of water. When the water starts to heat up gradually, the frog feels warm but not alarmed. By the time the water has gotten hot enough to be dangerous, the frog is already dead. Hungarians living in the country are sitting in the pot of water, gradually getting warm. By contrast, if a frog from the outside is dropped into a pot of dangerous hot water without the gradual warm-up, it jumps out immediately because it can tell that the situation is intolerable. Consider me that frog. Sometimes outsiders can be useful.

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